In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-401

DWIGHT L. CHAPIN, PETITIONER

v.

UNITED STATES OF AMERICA

MEMORANDUM OF THE UNITED STATES IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Petitioner contends that the questions which formed the predicate for this conviction for making false material declarations before a federal grand jury were impermissibly vague, even though the trial jury found that his answers were knowingly and willfully false under *all* reasonable interpretations of the questions, as well as under the interpretations actually held by petitioner at the time he gave his answers. Furthermore, while an exhaustive *voir dire* examination of prospective jurors failed to reveal any significant awareness of petitioner or any possible bias against him, he asserts that he was improperly tried because of pre-trial publicity and the racial composition of Washington, D.C. He also claims that the trial judge erred in not asking questions to elicit details of the political beliefs of prospective

jurors. Although we rely primarily on the thorough and considered opinion of the court below, we summarize here our basic position.

STATEMENT OF THE CASE

An indictment filed on November 29, 1973, charged petitioner, Dwight L. Chapin, with four counts of making false material declarations before a grand jury in violation of 18 U.S.C. § 1623. Trial commenced before District Judge Gerhard Gesell and a jury on April 1, 1974, without any request being made for a continuance. Count Four was dismissed by the court at the close of the government's case, and on April 5, 1974, the jury returned its verdict, convicting petitioner on Counts One and Three and acquitting him on Count Two. On May 15, 1974, the court sentenced petitioner to two concurrent terms of imprisonment for ten to thirty months. The judgment of conviction was affirmed on July 14, 1975, by the United States Court of Appeals for the District of Columbia in a unanimous opinion. 515 F.2d 1274. Petitioner thereafter began to serve his sentence without seeking bail pending possible review by this Court.

1. On April 11, 1973, Dwight L. Chapin appeared before a grand jury investigating the activities of Donald Segretti concerning possible violations of federal statutes relating to the publication and dissemination of political campaign statements without proper identification of the persons or groups responsible for the statements. Chapin, while Appointments Secretary to the President, had recruited Segretti to play "pranks" on the various Democratic candidates to create dissension within the Democratic Party during the 1972 Presidential primaries campaign. It was hoped that the dissension would prevent the Party from coalescing behind its eventual nominee. During his testimony, Chapin falsely minimized his involvement with Segretti. Although he acknowledged re-

cruiting Segretti, he denied any responsibility for, or detailed knowledge of, Segretti's specific activities.

2. The first count upon which the jury found that Chapin deliberately lied involved the following exchange:

> Q: To your knowledge did Mr. Segretti ever distribute any statements of any kind, or any campaign literature of any kind?
> A: Not that I am familiar with.

The government's evidence established that Segretti had printed and then distributed numerous pieces of fictitious campaign literature falsely ascribing certain positions to various Democratic candidates or associating the candidates with scandoulous and scurrilous statements. In accordance with instructions from Chapin, Segretti mailed a copy of each of the documents to Chapin (J.A. 139, 155, 165, 222-23),[1] and the two subsequently conversed about a number of them. For example, they discussed:

(a) cards handed out at a rally for Governor Wallace comparing Wallace to Hitler and urging people to vote for Senator Muskie (GX 12; J.A. 142-43, 331-32);[2]

(b) a news release on the stationery of Senator Muskie accusing Representative Chisolm of engaging in bizarre acts and alleging that she had been institutionalized for mental illness (GX 25; J.A. 170-72, 222, 338); and

(c) a press release issued on the stationery of Senator Muskie charging that Senators Humphrey and Jackson had been involved in sexual misconduct (GX 17; J.A. 158-62, 217, 220, 335).

Moreover, the evidence left no doubt that Chapin was aware that Segretti had been responsible for distribution of the materials. In their discussion of the so-called

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[1] "J.A." refers to the Joint Appendix in the court below.

[2] "GX" refers to Government Exhibit at trial.

"sex letter" (example (c) above), Chapin asked Segretti how much it cost to have the letter distributed. When Segretti told him that the cost was only $20, Chapin replied that the publicity was worth $10,000 to $20,000, but urged Segretti to be careful that he did not get caught. (J.A. 159, 217, 220.)

Chapin defended at trial on the ground that the question asked only whether he was aware of Segretti distributing the materials "personally" and that in fact Segretti either had mailed the documents or given them to assistants to hand out and had not himself handed them to the public. Chapin, however, never testified that he interpreted the question in this fashion at the time he answered the question before the grand jury and in fact testified at trial that he understood the word "distribute" to include "the method by which something goes from the point of production to the hands of the consumer. It deals with the channels by which it goes, the economics of how it is handled, how it is merchandized, that kind of a context" (J.A. 306).

3. Chapin's second conviction for perjury stemmed from the following exchange:

> Q: Did you ever express any interest to him, or give him any directions or instructions with respect to any single or particular candidate?
>
> A: Not that I recall.

The evidence demonstrated that on several occasions Chapin had told Segretti to concentrate on embarrassing Senator Muskie. For example, he told Segretti to arrange for disheveled looking persons to carry "Muskie for President" signs in anti-Nixon demonstrations (J.A. 113), to have people picket Muskie appearances in California with signs supporting other Democratic candidates, and to arrange for pickets at Muskie's home with signs raising the "Why not a Black Vice-President" issue (J.A. 119-21). When Chapin read in a White House news summary that Muskie had "maintained his cool" in

the face of hecklers at a Whittier College appearance, he ripped out the page, wrote a note on it, and mailed it to Segretti. The note read: "Don—We really missed the boat on this. Obviously the press now wants to prove the EM can keep his temper—let's prove he can't." (J.A. 130-31.)

DISCUSSION

1. The questions petitioner seeks to have resolved by this Court concerning the proper interpretation of 18 U.S.C. § 1623 are not presented by the record. Under the trial court's instructions [3]—instructions that were not challenged at trial or in the court below and are not challenged here (Pet. 13)—the jury was required to find beyond a reasonable doubt on each count on which it returned a verdict of guilty that the declaration in issue "was in fact false" under *all* "reasonable interpretations of the question" to which petitioner was responding. In addition, the jury had to determine, again beyond a reasonable doubt, "that [petitioner] at the time he answered knew the answer to be false." The jury specifically was charged that an answer is not "false" if "it is literally true and technically responsive."

Thus, the "defense of impreciseness" (Pet. 22) was fully available to petitioner, who could not have been convicted unless the jury found that he willfully gave false answer to the question as he understood it. In contending that the court below held that it is "enough to say that the imprecise questions are 'subject to a reasonable and definite interpretation by the jury' " (Pet. 23) petitioner ignores the court of appeals' reliance on the trial court's instructions on wilfullness, which required the jury to focus on the interpretation actually held by petitioner as well as on "objective" interpretations (Pet. App. 5a-6a). Contrary to petitioner's suggestion (Pet. 24, 25) the jury could not have ascribed to

[3] The relevant instructions are set out in full in the Petition, pp. 12-13.

him an understanding that he did not in fact have, nor could it have convicted him "because he misunderstood which of several meanings the interrogator attached to his question or made a wrong guess as to which of several meanings the jury later thinks is the most reasonable interpretation."

Similarly, petitioner misrepresents the court's opinion in urging that the court held that vagueness cannot be raised as a defense when the vagueness first becomes "apparent" upon "ingenious scrutiny" of the questions and answers after the testimony in issue is given (Pet. 22-23). In fact, the court concluded that it was not necessary to decide "whether a conviction would be upheld if the government proved that the defendant was answering some possible-and-reasonable interpretation of the question but falsely answering the question as he himself interpreted it" (Pet. App. 5a).[4] Petitioner was afforded the opportunity of acquittal if his answer was literally true under *any* reasonable interpretation of the question, even if petitioner did not hold that interpretation at the time he testified.

In short, the decision of the court below was fully consistent with the principles established by this Court's decision in *Bronston* v. *United States*, 409 U.S. 352 (1973), and does not raise any novel or complex legal issues, much less issues that would warrant review by this Court. Thus, in seeking review here, petitioner in effect asks this Court to reappraise the court of appeals' conclusion that the evidence was sufficient to support the

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[4] Petitioner's confusion apparently stems from the court's conclusion (clearly correct) that in the context of the purpose of the grand jury's investigation, which was known to Chapin, and the series of questions asked the questions were susceptible to a reasonable and definite interpretation. As the court noted, quoting from *United States* v. *Ceccerelli*, 350 F. Supp. 475, 478 (W.D. Pa. 1972), a different conclusion would bar all perjury prosecutions, because "[a]lmost any question or answer can be interpreted in several ways when subjected to ingenious scrutiny after the fact" (Pet. App. 5a).

jury's verdicts on each count on which petitioner was convicted (Pet. App. 7a, 9a-10a). Moreover, contrary to petitioner's bald assertion that this is the "first opportunity for this Court to chart the contours" of 18 U.S.C. § 1623 (Pet. 19), there have been numerous prosecutions under that section, and this is not the first time review has been sought in this Court.[5] See, *e.g.*, *United States* v. *Kahn*, 472 F.2d 272 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973); *United States* v. *Ruggiero*, 472 F.2d 599 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973). Indeed, prior cases, unlike this case, have involved the novel aspects of that section: the elimination of the two-witness rule and the recantation provision. See 18 U.S.C. §§ 1623 (d), (e).

2. It is readily apparent that the trial court applied long standing precedents of this Court in refusing to change the venue of petitioner's trial and, accordingly, that there is no reason for this Court to exercise its supervisory jurisdiction. Petitioner relies solely on the "inherent prejudice stemming from the totality of the Watergate publicity," but in *Irvin* v. *Dowd*, 366 U.S. 717, 722-23 (1961), which was reaffirmed last Term in *Murphy* v. *Florida*, 95 S.Ct. 2031, 2036 (1975), this Court firmly established that it is not necessary that "jurors be totally ignorant of the facts and the issues involved." A defendant receives a trial by an impartial jury when all jurors "can lay aside [any] impression or

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[5] There is no conflict between the decision below and the decision in *Wall* v. *United States*, 371 F.2d 398 (6th Cir. 1967), or *Van Liew* v. *United States*, 321 F.2d 674 (5th Cir. 1965). As the court below noted, in *Wall*, unlike this case, there was no evidence to support a finding that the defendant's answer was false with respect to the more reasonable of two possible interpretations (Pet. App. 5a-6a). In *Van Liew*, the court held that the government was required to show that the question asked reasonably could be interpreted as urged by the government and that the defendant intentionally gave a false answer. The government met that obligation here, and the court's instructions required the jury to make the appropriate findings.

opinion and render a verdict based on the evidence presented in court."

After a thorough painstaking *voir dire* examination, which was not challenged on appeal, the trial court determined that none of the prospective jurors had an opinion of guilt. Of the 120 veniremen, at most 22 had heard or read about Chapin or this case. All were examined individually, and none had any fixed preconceptions. (J.A. 63-64, 68, 71.) Thus, nothing in the *voir dire* indicated a community "deeply hostile to the accused," *Murphy* v. *Florida*, *supra*, 95 S.Ct. at 2037, or a "pattern of deep and bitter prejudice," *Irvin* v. *Dowd*, *supra*, 366 U.S. at 727-28, that required the trial court to reject the jurors' sworn assurances that they could render fair and impartial verdicts based solely upon the evidence presented in court.

Moreover, the nature and impact of the publicity concerning petitioner was far different from that in cases like *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966), where this Court has reversed convictions because of prejudicial pre-trial publicity.[6] As the court below analyzed the record (Pet. App. 15a):

> Our own scrutiny of the publicity in the community about appellant prior to the trial, *see Sheppard* v. *Maxwell*, *supra*, 384 U.S. at 362, 86 S.Ct. 1507, convinces us that the trial judge was correct in refusing to allow the transfer. While appellant's upcoming trial attracted some newspaper attention, the articles were not front-page stories, frequently mentioned the trial only in passing, and a large number concentrated on John Dean's role as a witness rather than Chapin's role as defendant. Those stories which were exclusively about the trial were factual accounts of motions filed by the defendant and pro-

[6] Even in *Sheppard*, the massive and highly inflammatory pretrial publicity directed at the defendant was not itself sufficient to lead this Court to conclude that Sheppard had not received a fair trial. 384 U.S. at 354-55, 358.

ceedings in open court. Editorial comment, to the extent there was any, was essentially sympathetic, deploring the possibility that of all the White House staff members, only Chapin, and not those more responsible for Watergate and the cover-up, was likely to be brought to trial and convicted. In addition, the publicity was at its height during January and February, 1974, and had decreased substantially by the time of trial in April. The Washington Post appears from the record to have carried no story about the trial the day it started.

The court then concluded (Pet. App. 15a-16a):

> Rather than the cases cited by appellant, we think the situation here more resembles that in some less celebrated cases, such as the larceny trial of Teamsters president Dave Beck. Reviewing the publicity there, the Supreme Court found: "The news value of the original 'disclosures' was diminished, and the items were often relegated to the inner pages. Even the occasional front-page items were straight news stories rather than invidious articles which would tend to arouse ill will and vindictiveness. If there was a campaign against him as petitioner infers, it was sidetracked by the appearance of other 'labor bosses' on the scene who shared the spotlight." *Beck* v. *Washington*, 369 U.S. 541, 556, 82 S.Ct. 955, 963, 8 L.Ed.2d 98 (1962) . . . The *Beck* case was reviewed under a standard which required a showing of prejudice to overturn the denial of a change in venue. 369 U.S. at *ibid.*, 82 S.Ct. 955. In the later, more sensational *Sheppard*, *Rideau*, and *Estes* cases, the Court did not require such a showing. We are of the opinion, however, that where publicity has not been virulent and sensational, where the community in which the trial is scheduled is large and inundated with other news, where the publicity is nationwide rather than local (appellant uncovered a substantial amount of publicity about Segretti and Chapin even in the Southern District of Iowa),

> where the jury is thoroughly questioned about what they have read and its effect, and where the jury is then sequestered, some showing of prejudice is required to overturn the trial court's reasoned decision. *See Murphy* v. *Florida*, —— U.S. ——, ——, 95 S.Ct. ——, 44 L.Ed.2d —— (1975); *Jones* v. *Gasch*, *supra*, 404 F.2d at 1242. Appellant has made no such showing, nor is it likely that he could in view of the jury's verdict of acquittal on a substantial portion of the charges.

Finally, petitioner totally ignores that a change of venue, the only relief he sought at trial, would have generated a tremendous amount of publicity in the transferee district. The court below properly considered this factor in upholding the trial judge's sound exercise of discretion in denying petitioner's transfer motion (Pet. App. 14a-15a).

3. In arguing that he could not receive a fair trial by a jury drawn from the predominantly black and Democratic citizenry of the District of Columbia, petitioner fails to take account of the factors that the court of appeals considered dispositive of his claims: (1) the "study" that petitioner submitted was not based upon empirical studies; (2) the jury in the case was nearly evenly split along racial lines; (3) petitioner was acquitted on substantial parts of the indictment; and (4) other "Watergate" defendants have been acquitted in the District of Columbia (Pet. App. 13a & n.8). As the court concluded: "the proof presented was not nearly sufficient [in light of the thorough *voir dire* on possible bias] for us to overturn a decision within 'the sound discretion of the trial court'" (Pet. App. 13a).

4. Finally, the court of appeals' discussion of the trial judge's failure to inquire as to the voting registration of the prospective jurors does not require elaboration. The court said (Pet. App. 16a-17a):

> It is possible that, because of changes in election laws since *Connors*, the two questions specifically

pointed out by Chapin on this appeal, relating to voter registration rather than actual voting, should have been asked. In the District of Columbia, voter registration lists by party are now compiled and are public. It would even have been possible for Chapin's attorneys, armed with the list of names and addresses of veniremen, to get part of the information directly from the Board of Elections. In these circumstances, the constitutional basis for denial of these particular questions is not as clear as for the others. As noted above, however, these two "registration" questions were buried in a list of much more questionable ones, and counsel at the trial did not, when faced with the judge's reasons for denying all the questions, single out these inquiries as permissible. In this situation, and especially since there was a substantial *voir dire* on political bias and prejudice, we cannot say that the trial judge abused his discretion in denying the list of political questions, including those only now highlighted, as a whole. *Compare Ham* v. *South Carolina*, 409 U.S. 524, 93 S.Ct. 848, 35 L.Ed.2d 46 (1973) (no questions asked about racial prejudice despite clear defense request).

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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Special Prosecutor

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